STATE OF MICHIGAN

COURT OF APPEALS

LORENZO CARUSO,

Plaintiff/Counter-Defendant-Appellant,

v

CAMBRIDGE INVESTMENT GROUP, INC., and NICHOLAS HOMES WEST, L.L.C.,

Defendants/Counter-Plaintiffs-Appellees.

UNPUBLISHED
September 27, 2007

No. 269279
Wayne Circuit Court
LC No. 03-336626-CH

Before: Owens, P.J., and White and Murray, JJ.

PER CURIAM.

Plaintiff Lorenzo Caruso, a licensed builder, brought this action to enforce construction liens for carpentry work he performed on seven residential properties for defendant Nicholas Homes West, LLC, the general contractor. Defendant Cambridge Investment Group, Inc., was the owner of record of the properties at the time the liens were filed. Plaintiff sought to foreclose on the liens under the Construction Lien Act (CLA), MCL 570.1101 *et seq*. After the parties agreed to have the trial court decide the case on the parties' briefs, deposition transcripts, and exhibits, the trial court found that plaintiff was entitled to a judgment of $12,968.75 for breach of contract. Plaintiff subsequently moved for an award of attorney fees and costs, and also requested that he be allowed to foreclose on the properties. The trial court awarded plaintiff $5,000 in attorney fees and $2,730 in costs, but refused to allow plaintiff to foreclose on the properties. Plaintiff appeals as of right. We affirm.

I. Attorney Fees

The parties do not dispute that plaintiff was the prevailing party in this action. However, plaintiff claims that the trial court erred by awarding attorney fees of only $5,000, although he requested fees in excess of $27,000. We disagree. We review the trial court's decision to award attorney fees under the CLA for an abuse of discretion and the trial court's findings of fact for clear error. *Solution Source, Inc v LPR Assoc Ltd Partnership*, 252 Mich App 368, 381; 652 NW2d 474 (2002). "A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire record is left with a definite and firm conviction that a mistake was made." *Id.* at 381-382.

MCL 570.1118(2), which permits the award of attorney fees under the CLA, states:

> In each action in which enforcement of a construction lien through foreclosure is sought, the court shall examine each claim and defense that is presented, and determine the amount, if any, due to each lien claimant or to any mortgagee or holder of an encumbrance, and their respective priorities. The court may allow reasonable attorneys' fees to a lien claimant who is the prevailing party. The court also may allow reasonable attorneys' fees to a prevailing defendant if the court determines the lien claimant's action to enforce a construction lien under this section was vexatious. . . .

MCL 570.1118(2) provides that the trial court *may* allow reasonable attorney fees to a lien claimant who prevails in his action. Although the word "shall" generally is used to designate a mandatory provision, the word "may" designates discretion. *Old Kent Bank v Kal Kustom Enterprises*, 255 Mich App 524, 532; 660 NW2d 384 (2003). "As a general rule, the word 'may' will not be treated as a word of command unless there is something in the context or subject matter of the act to indicate that it was used in such a sense." *Mill Creek Coalition v South Branch of Mill Creek Intercounty Drain Dist*, 210 Mich App 559, 565; 534 NW2d 168 (1995). Because nothing in MCL 570.1118(2) indicates that the award of attorney fees to a prevailing party is mandatory, we conclude that the Legislature's use of the word "may" in this statute signifies that it intended to give the trial court the discretion to award reasonable attorney fees to a prevailing lien claimant. Stated differently, the trial court is not *required* to award attorney fees to a prevailing lien claimant.

In addition, MCL 570.1118(2) specifies that a trial court "may allow *reasonable* attorneys' fees to a lien claimant who is the prevailing party." Although the trial court has the discretion to award attorney fees to a prevailing lien claimant, it is only permitted by statute to award a fee that is reasonable. Accordingly, because the trial court in this case exercised its discretion to award attorney fees to plaintiff, we will uphold the trial court's award as long as it is reasonable.

"The burden is on the party seeking the attorney fees to establish the reasonableness of the attorney fees." *Solution Source*, *supra* at 382. Among the factors a court may consider in determining the reasonableness of attorney fees are "(1) the complexity and difficulty of the case and the number of working hours which reasonably can be justified; and (2) whether the defendant's refusal to pay the claimed debt was unreasonable." *Superior Products Co v Merucci Bros, Inc*, 107 Mich App 153, 159-160; 309 NW2d 188 (1981).

We find no merit to plaintiff's argument that the trial court did not make appropriate findings of fact to support its award of attorney fees. The court considered the straightforward nature of the case, the amount of recovery received, the issues involved, and the nature of the services performed when determining the appropriate award. Although plaintiff argues that defendants' refusal to pay was unreasonable, he relies only on the fact that he prevailed at trial to establish error. Plaintiff cannot prove that defendants unreasonably refused to pay his claim simply by establishing that he prevailed at trial. Conversely, the record discloses that plaintiff was paid for much of the work he performed, and the dispute in this case involved a claim for extra services rendered. This dispute developed in part because the parties never reduced their agreement to writing, creating uncertainty regarding the terms of their agreement. Under the

circumstances, the trial court did not clearly err in determining that defendants' alleged unreasonableness in paying the disputed amount was not a factor supporting a higher award of attorney fees.

In addition, the trial court did not clearly err in characterizing the case as fairly straightforward. Unlike *Superior Products Co*, *supra* at 160, which involved multiple parties, significant amounts of time spent on discovery, and a contested trial, only two defendants were involved in this case, only two depositions were taken, and the case was decided on the parties' briefs and exhibits. Further, plaintiff's attorney was not required to prepare for a trial or to appear in court to obtain the judgment.

The trial court also considered the nature of the services performed and found that some of the requested fees and times charged were inflated and that plaintiff was requesting reimbursement for unnecessary services. MCL 570.1118(2) only permits an award for "reasonable" attorney fees, not actual fees. Further, the trial court properly considered the amount of plaintiff's recovery in determining a reasonable amount for an award of attorney fees. See *Bosch v Altman Constr Corp*, 100 Mich App 289, 301-303; 298 NW2d 725 (1980).

For these reasons, the trial court did not abuse its discretion when it declined to award plaintiff his requested amount of attorney fees and determined that an award of attorney fees in the amount of $5,000 was reasonable in this case.

II. Foreclosure

Next, plaintiff argues that the trial court erred by not allowing him to foreclose on the subject properties. We disagree. We review questions of law involving statutory interpretation and statutory construction de novo. *Michigan Muni Liability & Prop Pool v Muskegon Co Bd of Co Rd Comm'rs*, 235 Mich App 183, 189; 597 NW2d 187 (1999); *Haworth, Inc v Wickes Mfg Co*, 210 Mich App 222, 227; 532 NW2d 903 (1995).

> Our primary purpose when construing a statute is to effectuate legislative intent. *In re MCI Telecom Complaint*, 460 Mich 396, 411; 596 NW2d 164 (1999). Legislative intent is best determined by the language used in the statute itself. *Id.* When the language is unambiguous, we give the words their plain meaning and apply the statute as written. *Id.* [*Omdahl v West Iron Co Bd of Ed*, 478 Mich 423, 427; 733 NW2d 380 (2007).]

We conclude that the plain language of the version of MCL 570.1203(4) in effect at the time the trial court denied plaintiff's request for foreclosure in 2005 indicates that plaintiff was barred from foreclosing on the residential properties on which he held construction liens because he neither joined the Homeowners Construction Lien Recovery Fund ("the fund") as a defendant in the foreclosure action nor served a summons and complaint on the fund director. The version of MCL 570.1203(4) in effect at the time was as follows:

> A subcontractor, supplier, or laborer who seeks enforcement of a construction lien on a residential structure through foreclosure shall join the fund[1] as a defendant in the foreclosure action, and a summons and complaint shall be served on the director by certified or registered mail, or by leaving a copy thereof at the office of the director. The failure to serve a summons and complaint upon the fund shall constitute a bar to recovery from the fund. After service upon the defendant of a summons and complaint in an action in which enforcement of a construction lien through foreclosure is sought, the department may intervene in the action as a party defendant with respect to other construction liens.[2]

Again, the word "shall" generally is used to designate a mandatory provision. *Old Kent Bank*, *supra* at 532. By stating that a subcontractor, supplier, or laborer seeking enforcement of a construction lien on a residential structure through foreclosure "shall join the fund as a defendant in the foreclosure action, and a summons and complaint shall be served on the director . . . ," this version of MCL 570.1203(4) required that the subcontractor, supplier, or laborer join the fund as a defendant in the foreclosure action and serve a summons and complaint on the fund director in order to foreclose.

Plaintiff does not dispute that he is a subcontractor seeking enforcement of construction liens through foreclosure on seven residential structures on which he performed carpentry work, but he also admits that he neither joined the fund as a defendant in this action nor served a summons and complaint on the fund director. Plaintiff claims that he did not join the fund as a defendant because he did not plan to recover from the fund. However, the plain language of the statute does not merely preclude plaintiff from recovering from the fund because he failed to join the fund as a defendant; instead, the applicable version of MCL 570.1203(4) affirmatively requires joinder of the fund in order to foreclose on a residential structure. Because plaintiff failed to join the fund as a defendant when he sought foreclosure on the properties on which he

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[1] Pursuant to MCL 570.1104(5), the "fund" refers to the Homeowner Construction Lien Recovery Fund, which is established by MCL 570.1201 *et seq*.

[2] With the passage of 2006 PA 572, the Legislature amended MCL 570.1203(4) effective January 3, 2007. The current version of MCL 570.1203(4) states as follows:

> A subcontractor, supplier, or laborer who seeks enforcement of a construction lien on a residential structure through foreclosure shall join the fund as a defendant in the foreclosure action within the period provided in [MCL 570.1117]. The subcontractor, supplier, or laborer shall serve a summons and complaint on the office of the fund administrator within the department by certified or registered mail or by leaving a copy at the office. The failure to serve a summons and complaint under this subsection bars recovery from the fund. After a defendant is served with a summons and complaint in an action to foreclose a construction lien, the department may intervene in the action as a party defendant with respect to other construction liens.

performed carpentry work, he cannot seek foreclosure on these properties in order to enforce his construction liens. Accordingly, the trial court did not err when it refused to allow plaintiff to foreclose on the seven properties on which he held construction liens.

Affirmed.

/s/ Donald S. Owens